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CITATIONS

479367—42

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 274

LOGAN W. MARSHALL AND GRACE M. MARSHALL, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 15–18) is not reported. The Circuit Court of Appeals delivered no opinion.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 8, 1942 (R. 85), and modified on June 29, 1942 (R. 91). A petition for rehearing was denied on June 5, 1942 (R. 91). The petition for a writ of certiorari was filed on July

31, 1942. Jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the court below erred in affirming the finding of the Board that the taxpayers had not sustained the burden of proving that they were entitled to deductions for income-tax purposes in 1936 and 1937 on account of the alleged loss in those years of cherry trees, such loss having resulted from a freeze in October 1935.

2. Whether the court below erred in rejecting secondary and opinion evidence concerning the value of the trees.

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—
>
> (1) if incurred in trade or business; or
>
> (2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or
>
> (3) of property not connected with the trade or business, if the loss arises from

fires, storms, shipwreck, or other casualty, or from theft. * * *

* * * * *

STATEMENT

Petitioners, husband and wife, filed joint income-tax returns for 1936 and 1937 (R. 57, 63). The underlying facts, which are not in dispute, may be summarized from the findings of the Board of Tax Appeals (R. 15–17) as follows:

In 1928 petitioner Logan W. Marshall purchased a farm on an island in Flathead Lake, Montana. He considered the raising of sweet cherries on the farm, and in September 1928 received letters, in answer to inquiries, from the Chief of the Division of Horticulture of the Montana Department of Agriculture and from R. W. Hockaday, a grower of cherries on the island (R. 15, 75–81). These letters conveyed information concerning the choice of varieties of cherry trees, the cultivation and marketing of cherries, and the cost of trees in quantity.

In 1929 Marshall planted a sweet-cherry orchard on his Flathead Lake island farm. The orchard was cultivated in that and successive years toward maturity. In October 1935 there occurred a severe storm and freeze. Damage to the trees was discovered the following spring; a large proportion of them were found then to be destroyed. Most of the balance were found in 1937 to have been destroyed or severely damaged, after efforts had

been made in the intervening year to save these trees.

Petitioner Marshall's activities in connection with the farm were limited to visits during the summer, varying in duration from a few days to three months. The farm is improved by a cottage of eight rooms, a water-pumping system for irrigation, a tool house, an automatic electric system, and two boathouses (housing an outboard-motored barge and a Chrysler speed boat). Marshall derived no profits from the farm during or prior to the tax years now in question (R. 16, 53). Over 95% of his income after 1927 was received as compensation for the performance of legal services (R. 6, 18).

Petitioners in their tax returns for 1936 and 1937 deducted $7,000 and $3,832.50, respectively, on account of the loss of cherry trees (R. 59, 67). The Commissioner of Internal Revenue disallowed these deductions and sent notice to petitioners of a deficiency in tax (R. 10–13). On review the Board of Tax Appeals sustained the Commissioner (R. 22). The Circuit Court of Appeals for the Sixth Circuit affirmed.

ARGUMENT

1. The Board concluded that petitioners had not sustained the burden of proving the tree losses which they claimed for 1936 and 1937. It found that the trees were frozen in 1935, and stated that there was no indication as to how many were

killed in that year and how many were lost in the tax years 1936 and 1937 (R. 17). Petitioner Marshall's attention was directed at the trial to this issue of fact (R. 17, 34, 43), but he produced no evidence bearing on it (see R. 28–56). The Board was clearly warranted, therefore, in determining (R. 18) that there was no evidence showing that the losses had occurred during 1936 and 1937.

The statute authorizes a deduction for "losses *sustained* during the taxable year." [Italics supplied.] Section 23 (e) of the Revenue Act of 1936. This standard of allowability is objective; unless a taxpayer proves that a loss was *sustained* during the tax year, no deduction is authorized. Accordingly, the decision of the Circuit Court of Appeals in affirming the Board's conclusion is plainly correct.

2. Petitioners complain (Pet. 8) of rulings of the Board of Tax Appeals excluding evidence offered by them concerning the value of the cherry trees. The contention that the court below erred in affirming these rulings is without importance in view of the failure to prove that the losses of trees were sustained during the tax years. In any event the rulings appear correct. Photostatic copies of schedules allegedly attached by petitioners to their 1936 return constituted only secondary evidence of the expenditures made on the farm; no proper foundation was laid by peti-

tioners for admitting it, since petitioner Logan W. Marshall apparently had in his possession the cancelled checks with which the scheduled expenditures were made (see R. 29–30, 36–37, 43–44). Further, it is doubtful whether the schedules sought to be introduced were material on the question of value, since they apparently contained chiefly accounts of disbursements for labor, taxes, repairs, and miscellaneous expenses on the farm without specific allocation to trees shown to have been destroyed in the years involved (see R. 36–37, 43; cf. R. 73).

Petitioners also offered opinion evidence of petitioner Logan W. Marshall concerning the value of the trees (R. 39–40). The Board sustained the Government's objection to this testimony on the ground that Marshall had not qualified himself to give opinion evidence. While he was owner of the personal property concerning the value of which he wished to testify, he was not expert in the matter of cherry orchards; his chief occupation was as a lawyer and he spent little time at the Montana farm (see Statement, *supra,* page 4). In addition, his opinion evidence appeared to be no more than the product of conjecture. (See R. 39–42.)

3. The Board correctly observed that petitioner Logan W. Marshall had not been shown to have engaged in orchard-farming as a business or as an enterprise for profit, and that therefore section

23 (e) (1) and (2) is in no event applicable here. Moreover, it expressly omitted to decide whether the storm and freeze of October 1935 was a cause of loss coming within the scope of section 23 (e) (3) of the Revenue Act (R. 18). Under the circumstances, there can be no conflict with the decisions relied upon by petitioner (Pet. 13–15) relating to the applicability of section 23 (e), for the absence of a showing that the claimed losses occurred when alleged foreclosed the applicability of any clause of section 23 (e) here.

CONCLUSION

The decision of the Circuit Court of Appeals is clearly right and presents no conflict or question calling for further review. It is therefore respectfully submitted that the petition for certiorari should be denied.

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